No. 01-223

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IN THE

Supreme Court of the United States

CONSUMER FEDERATION OF AMERICA, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AS *AMICUS CURIAE* IN SUPPORT OF CONSUMER FEDERATION OF AMERICA, *ET AL.*

HENRY L. BAUMANN
JACK N. GOODMAN *
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

* Counsel of Record

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The National Association of Broadcasters, with consents of the parties, submits this brief *amicus curiae* in support of the Consumer Federation of America, *et al.* (CFA), Petitioners in the above-captioned proceeding.

INTERESTS OF *AMICUS* [1]

The National Association of Broadcasters (NAB) is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents the American broadcasting industry.

This case presents two issues of critical concern to *amicus* and its members. The court of appeals invalidated certain Federal Communication Commission (FCC or Commission) regulations applicable to operators of cable television systems on the grounds that, *inter alia*, the FCC had not met its burden of justifying these regulations under the First Amendment. Broadcast television stations compete with cable systems in the provision of video programming to the public and in the sale of advertising, as well as being the source of the most popular programming on cable systems. The environment in which broadcast stations and cable systems compete has largely been defined by regulations, statutory and administrative. *Amicus*, therefore, is heavily involved in legislative, regulatory and judicial proceedings concerning the regulation of cable television and the video marketplace. Often, cable operators' First Amendment status has been a significant issue in these proceedings, and *amicus* therefore has a vital interest in decisions affecting the nature and scope of the protection afforded cable television systems by the First Amendment.

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[1] Pursuant to S. Ct. R. 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members and its counsel, contributed monetarily to the preparation or submission of this brief.

The broadcast stations that are members of NAB also have their vital interests affected, on a daily basis, by regulations promulgated by the FCC pursuant to both (1) its general statutory authority under the Communications Act of 1934 to regulate interstate communications in the "public interest, convenience and necessity," and (2) more specific congressional directives to prescribe rules pertaining to particular subjects or issues. *Amicus* accordingly is concerned about the level of deference that statutory provisions, and FCC regulations adopted pursuant to those provisions, receive from reviewing courts.

SUMMARY OF ARGUMENT

The Court should grant certiorari in this case to address recurring, unresolved questions concerning the appropriate level of First Amendment review of structural economic regulations that affect the cable television industry, or communications industries generally, but that do not directly regulate speech itself. The cable industry has consistently argued to reviewing courts that virtually any type of economic regulations affecting it (such as the ownership rules at issue here) entail serious First Amendment implications and must be subjected to significantly heightened judicial scrutiny. By acquiescing in the cable industry's position, the courts of appeals have failed to consider the practical, legal and policy implications of reflexively subjecting economic regulations to raised constitutional scrutiny.

As will be shown, the heightened scrutiny approach increasingly employed by the courts of appeals is in considerable tension, if not outright conflict, with this Court's decisions. This Court has made clear that the First Amendment should not be read as requiring a heightened level of review for an economic-oriented regulation merely because it affects a communications industry, unless such a regulation was adopted for a speech-repressive or other invidious purpose. *See Leathers v. Medlock*, 499 U.S. 439 (1991).

Although *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), applied "intermediate" scrutiny to the must carry rules, those rules directly impact the speech of cable operators by requiring them to carry specific broadcast signals, and thus pose a far different question from the one addressed by the court of appeals in this case. Even following *Turner*, members of this Court expressed clear reservations about applying heightened First Amendment scrutiny to the economic regulation of a communications-related industry in oral argument in cases (subsequently mooted by legislation), which involved restrictions on telephone companies providing video programming to subscribers.

This Court should also grant certiorari to clarify the level of deference reviewing courts should give to legislative rules adopted by the FCC pursuant to Congress' express delegation of authority. The lack of deference shown by the court of appeals in this case frustrates the ability of Congress to rely on the experience and expertise of administrative agencies. Furthermore, reviewing courts should not—as this case demonstrates—be able to circumvent the deference owed to Congress by initially rejecting challenges to a statute under deferential review, but then showing virtually no deference to the regulations promulgated by the agency expressly directed by Congress to implement the statute.

REASONS FOR GRANTING REVIEW

I. ECONOMIC REGULATION OF A COMMUNICATIONS-RELATED INDUSTRY SHOULD NOT AUTOMATICALLY RECEIVE HEIGHTENED FIRST AMENDMENT SCRUTINY.

A. The Cable Industry Has Consistently Argued To Reviewing Courts That Virtually Any Economic Regulation Of It Entails Serious First Amendment Concerns.

The decision of the court of appeals in this case to apply heightened First Amendment scrutiny to structural economic

regulation of the cable television industry is indicative of a trend. The cable industry has a long history of contending that any economic-oriented regulation, or regulation affecting its structure, has serious First Amendment implications and must therefore be subjected to significantly heightened judicial scrutiny. For example, the cable industry challenged, on First Amendment grounds, the regulation of the rates it charged consumers because "regulating cable rates inevitably affects both the content and quantity of speech by limiting the amount of money that a cable operator can spend on programming." *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 966 (D.C. Cir. 1996).[2] Although the courts reviewing challenges to economic regulations, such as rate regulation, have on occasion expressed skepticism about certain of the cable industry's claims, the courts have nonetheless increasingly subjected these types of economic or structural regulations to heightened First Amendment scrutiny.[3] The court of appeals in this proceeding similarly

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[2] In that case, the cable industry also claimed that numerous other provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act) and the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984 Cable Act) violated the First Amendment, including provisions specifically applicable to vertically integrated video programmers (*i.e.*, video programmers in which cable operators have an ownership interest). The parties challenging these various statutory provisions urged the court to apply strict scrutiny, the most stringent level of First Amendment review under which the government must establish a compelling interest, directly advanced by the least restrictive regulatory means. *See Time Warner,* 93 F.3d at 962, 966.

[3] For instance, when reviewing the FCC's rate regulation rules, the D.C. Circuit "assume[d] that rules requiring cable operators to charge reasonable rates burden speech, *although it is by no means clear how they do so.*" *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 185 (D.C. Cir. 1995) (emphasis added). Despite this apparent reservation, the D.C. Circuit still applied intermediate scrutiny to the FCC's cable rate rules, *id.* at 186, and to the various statutory provisions authorizing rate and other Commission regulation of the cable industry. *See Time Warner*,

applied intermediate scrutiny to the Commission's rules implementing the horizontal and vertical ownership limits of the 1992 Cable Act. *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (App. 1-29).[4] Thus, the courts of appeals have, with relatively little consideration in some cases, accepted arguments by the cable and other communications-related industries that structural or other economic regulation of those industries automatically merits a raised level of judicial scrutiny under the First Amendment.[5]

B. The Trend In The Courts Of Appeals To Apply Heightened First Amendment Scrutiny To Structural Economic Regulation Of Media Entities Represents An Unwarranted Extension Of This Court's Precedents.

This Court should grant review in this case to clarify that structural economic regulation is not subject to heightened First Amendment review whenever such regulation is directed at a media or communications entity. Courts of appeals that have accepted the cable industry's arguments

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93 F.3d at 967. For these rate and other regulations to be upheld, the government accordingly had to establish that they advanced substantial governmental interests and did not burden substantially more speech than necessary to achieve those interests. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

[4] The horizontal ownership limit restricts "the number of cable subscribers" any commonly-owned cable systems are "authorized to reach." The vertical limit restricts "the number of channels on a cable system that can be occupied" by integrated programming suppliers (*i.e.*, those in which cable operators have ownership interests). 47 U.S.C. § 533(f)(1)(A) & (B).

[5] *See also Chesapeake and Potomac Telephone Company of Virginia v. United States*, 42 F.3d 181 (4th Cir. 1994); *US West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1994) (applying intermediate scrutiny to a market structure regulation prohibiting telephone companies from providing video programming to subscribers within their service areas).

have failed to consider the practical, legal and policy implications of routinely subjecting economic regulations to heightened constitutional scrutiny.

Amicus believes that reflexively subjecting the economic regulation of a specific communications-related industry, such as cable, to heightened judicial review gives insufficient consideration to the policy judgments of Congress, and is not required by this Court's previous decisions or the First Amendment. Obviously, if regulations analogous to the horizontal and vertical ownership limits at issue in this case were imposed on a particular non-communications industry, they would receive only a rational basis review and would be upheld if they bore a "reasonable relation" to a "legitimate" governmental "purpose." [6]

Indeed, the trend in the courts of appeals to subject structural regulation of communications entities to heightened First Amendment scrutiny is in considerable tension, if not outright conflict with, this Court's precedents. This Court has made clear that a regulation is not subject to heightened

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[6] *Exxon Corporation v. Governor of Maryland,* 437 U.S. 117, 124-25 (1978) (applying rational basis review to a state law prohibiting oil producers and refiners from operating their own retail service stations, which was enacted because the state believed that "producers and refiners were favoring company-operated stations in the allocation of gasoline and that this would eventually decrease the competitiveness of the retail market"). Similarly, Congress directed the FCC to establish the vertical and horizontal ownership restrictions at issue here "to enhance effective competition" because it believed that (i) "cable operators affiliated with video programmers" would "favor such programmers in determining carriage on their cable systems" or "restrict the flow of the video programming of such programmers to other video distributors," and (ii) cable operators because of their "size" could "unfairly impede" the "flow of video programming" to the "consumer." 47 U.S.C. §§ 533(f)(1), (f)(2)(A) & (f)(2)(B). *Amicus* challenges the cable industry's position that Congress' discretion to adopt industry-specific economic regulations automatically lessens if the industry in question is communications-related.

review merely because it affects a communications-related industry, unless there is "an additional basis for concluding" that such a regulation was adopted for a speech-repressive or other invidious purpose. *Leathers v. Medlock*, 499 U.S. 439, 449 (1991). To the contrary, economic regulation of a communications or speech-related industry does not raise any issue warranting heightened scrutiny, even if a "differential burden" is placed on different types of media,[7] unless the regulation was in fact directed at, or intended to impact, protected speech. *See Leathers*, 499 U.S. at 453 (the "differential taxation of speakers, even members of the press, *does not implicate the First Amendment* unless the tax is directed at, or presents the danger of suppressing, particular ideas") (emphasis added).[8]

Leathers clearly undercuts the assumption that virtually any type of economic regulation specifically affecting the cable industry automatically merits heightened judicial scrutiny. Certainly this Court has previously rejected relying on the First Amendment as a basis for reviewing economic regulations, even in cases directly involving speech or other First Amendment-related activities. For example, in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), this Court upheld, under a rational basis review, a tax statute that treated certain nonprofit organizations more

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[7] *Leathers*, 499 U.S. at 452 (the extension of an existing sales tax to cable television service, while continuing to exempt print media, held not to violate First Amendment). *See also R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 387-88 (1992) (in examining the constitutionality of a city hate speech ordinance, the Court observed that the State could prohibit obscenity "only in certain media or markets" and could "choose to regulate price advertising in one industry but not in others").

[8] *See also Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (the application of the anti-trust laws to a newspaper that attempted to force its advertisers to boycott a competing radio station was held not to violate the First Amendment, even though the newspaper publisher claimed a right to select its customers and to refuse to accept advertisements from whomever it pleased).

favorably if they did not engage in substantial lobbying activities. The court of appeals in *Regan* had determined that heightened scrutiny was required because the statute "affect[ed] First Amendment rights on a discriminatory basis." *Taxation With Representation of Washington v. Regan*, 676 F.2d 715, 728 (D.C. Cir. 1982). This Court rejected that reasoning, and concluded that the tax statute did not violate either the First or Fifth Amendment rights of the appellant nonprofit organization. The Court found, in particular, "no indication that the statute was *intended to suppress any ideas* or any demonstration that it has had that effect." *Regan*, 461 U.S. at 548 (emphasis added).

Amicus accordingly asserts that an economic regulation applicable to an industry engaged in speech-related activities, such as cable, should not be subjected to heightened scrutiny absent any "indication that the statute was intended" to, or had the effect of, "suppress[ing] any ideas." *Id.* This Court has, in fact, previously applied rational basis review in a case challenging on constitutional grounds a provision of the 1984 Cable Act that required local cable franchising of certain Satellite Master Antenna Television (SMATV) facilities. *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). Although the SMATV operators in *Beach* contended that the FCC had construed the 1984 Cable Act in a manner violating the equal protection component of the Fifth Amendment by not requiring the franchising of similar SMATV facilities, this Court upheld the Act under a rational basis review because in the "areas of social and economic policy," it is not for the "courts to judge the wisdom, fairness, or logic of legislative choices." *Beach*, 508 U.S. at 313. Surely the standard of review applied in *Beach* should not have differed if First Amendment claims, as well as equal protection claims, had been considered.[9] Yet under the logic of the

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[9] This Court has in fact expressed clear skepticism about relying "on the First Amendment" to review "economic regulations," and has asserted

court of appeals decision in the present case, such heightened scrutiny would have been warranted in *Beach*.

In sum, a number of decisions by this Court cast doubt on the cable industry's position that structural or other economic regulations affecting it automatically merit heightened First Amendment scrutiny. This Court's decisions in the *Turner* cases are not to the contrary.[10] In these cases, this Court applied intermediate scrutiny to rules requiring most cable systems to set aside up to one-third of their channels for the carriage of local commercial broadcast signals. 47 U.S.C. § 534(b)(1)(B). This set-aside requirement "reduce[d] the number of channels over which cable operators exercise[d] unfettered control," and the cable industry complained that the requirement "render[ed] it more difficult for cable programmers to compete for carriage on the limited channels remaining." *Turner I*, 512 U.S. at 636-37. The cable operators also claimed in *Turner I* that, as a consequence of the broadcast carriage requirements, "some cable programmers who would have secured carriage in the absence of must-carry may now be dropped." *Id.* at 657.[11]

Thus, the must carry rules at issue in the *Turner* cases directly regulated the speech of cable system operators—and were claimed to directly foreclose speech opportunities for some cable programmers—by requiring carriage of certain broadcast programming. Indeed, the cable system operators in *Turner I* contended that the must carry provisions should

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that "economic regulation . . . should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 476-77 (1997).

[10] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*).

[11] On remand, the cable industry was unable to substantiate this latter claim.

"trigger strict scrutiny because they *compel* cable operators to transmit speech not of their choosing." 512 U.S. at 653 (emphasis added).[12] Because the must carry rules directly regulate speech for other, non-content related purposes, this Court properly applied intermediate scrutiny in *Turner*.

In contrast, structural or other economic regulations applicable to the cable industry, including the ownership limits at issue here, do not regulate speech, compel speech, or even affect speech directly. It is, for example, difficult to discern how certain economic regulations (such as cable rate regulation) even remotely burden speech. The horizontal and vertical limits similarly do not directly impact *speech*, but regulate the ownership and economic structure of the cable industry. A legislative or regulatory determination that a single entity should not reach more than a certain percentage of a market, or otherwise exercise excessive control in a market through its integrated ownership interests, is not a regulation of *speech* meriting heightened judicial scrutiny, even if the "market" at issue is for video programming.[13] Nor

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[12] This Court has explicitly determined that the First Amendment is implicated when the government attempts to compel expression. *See, e.g., Pacific Gas and Elec. Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986). However, in *Turner I*, the Court rejected the application of strict scrutiny because the must carry rules were content neutral, and would not "force cable operators to alter their own messages to respond to the broadcast programming they are required to carry." 512 U.S. at 655. The Court also emphasized that the First Amendment did not "disable" the government from ensuring that cable system operators did "not restrict, through physical control of a critical pathway of communication, the free flow of information" into subscribers' homes. *Id.* at 657.

[13] This Court has previously upheld against First Amendment challenges FCC rules similarly regulating the ownership and structure of the broadcast industry without engaging in any heightened scrutiny. *See, e.g., FCC v. NCCB*, 436 U.S. 775 (1978) (upholding the prohibition on common ownership of a daily newspaper and a broadcast facility in the same geographic market).

has there ever been a suggestion that the cable ownership limits were intended to prevent any speaker's ideas from becoming too powerful, but rather were motivated by unexceptional concerns about the cable industry's economic dominance and preserving competition in the video programming market.

It is thus a misreading of the *Turner* decisions to conclude that they stand for the proposition that all economic or structural regulations affecting the cable industry merit increased scrutiny by reviewing courts. The courts of appeals have consequently erred by interpreting *Turner* as requiring the application of heightened scrutiny in all cases involving regulation of the cable industry, even if the regulation in question may not actually regulate or burden speech. *See Time Warner*, 56 F.3d at 185 (D.C. Circuit applied intermediate scrutiny to FCC's cable rate regulations, even though it was "by no means clear how" rules "requiring cable operators to charge reasonable rates burden speech"). Given the frequency with which Congress adopts legislation affecting the cable and other telecommunications industries, these questions will no doubt continue to arise in numerous cases. Review should accordingly be granted to provide much needed clarity respecting the standard of review applicable to structural economic regulation of communications industries.

C. The Oral Argument Before This Court In A Case Following *Turner I* Reveals Unresolved Questions Pertaining To The Appropriate Level Of Review Of Economic Regulations Affecting Communications-Related Industries.

Members of this Court also clearly expressed reservations about applying a heightened level of First Amendment scrutiny to the economic regulation of a communications-related industry in oral argument in cases involving the now-eliminated statutory restrictions on local telephone companies providing video programming to subscribers within their

service areas. *See* Transcript of Oral Argument in *United States v. Chesapeake and Potomac Telephone Company of Virginia; NCTA, Inc. v. Bell Atlantic Corp.*, Nos. 94-1893, 94-1900, 1995 U.S. Trans Lexis 107 (Dec. 6, 1995).[14] Significantly, this uncertainty about the appropriate "standard of review" (*id.* at *30) to apply toward an economic/structural regulation restricting telephone companies from providing video programming was expressed *after* the decision in *Turner I*.

As observed in the *Chesapeake and Potomac* oral argument, "what we have here really is classical economic regulation" that "happens to be economic regulation in an area where people are providing . . . communication services." 1995 U.S. Trans Lexis 107 at *30. Because the government's interest in this case was "an economic one," *id.* at *33, questions were raised about "retreat[ing] from giving Congress quite a lot of discretion when it tries to deal with the structure of industries," and about the grounds for "depart[ing] from the normal rational basis" when "dealing with economic regulation in the communications area." *Id.* at *30-31.

As also noted in this oral argument, the United States is "becom[ing] more and more a speech-intensive, speech-creative, speech-obsessed society," and concern was expressed about "hav[ing] more and more cases" involving First Amendment challenges to economic regulations as others, such as "software manufacturer[s]," assert that they are "engaged in speech." *Id.* at *32. The questions posed additionally reveal concern by this Court that Congress should be able to pass "an economic regulation" (such as one "to protect consumers . . . from prices") that applies to a

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[14] The Court never issued an opinion in these cases because they were mooted by passage of the 1996 Telecommunications Act, which eliminated the challenged restrictions (formerly contained in 47 U.S.C. § 533(b)) on telephone companies.

communications-related industry (such as "the broadcast cable industry"), rather than "cement companies," because "[t]hat's what [Congress is] interested in." *Id.* at *37-38.[15] In sum, the *Chesapeake and Potomac* oral argument raised the question of whether "this whole big economic area" of regulating communications services would "be turned over to courts." *Id.* at *30.

From the lengthy discussion in *Chesapeake and Potomac*, the members of this Court evidently do not regard *Turner* as having resolved all questions concerning the appropriate level of scrutiny for reviewing structural or other economic regulations affecting communications industries. *Amicus* urges the Court to grant CFA's petition for certiorari to address these issues specifically, and resolve the questions about the grounds for "depart[ing] from the normal rational basis" review when "dealing with economic regulation in the communications area." Oral Argument in *Chesapeake and Potomac*, 1995 U.S. Trans Lexis 107 at *31.

As communications-related industries become an ever larger and more important part of the U.S. economy, questions concerning the discretion of Congress and the states to regulate the ownership and structure of these industries will only proliferate. *See* 1995 U.S. Trans Lexis 107 at *32. But the insistence of the cable industry that any structural or economic regulation affecting it automatically requires heightened First Amendment scrutiny harkens back to the (now discredited) jurisprudence limiting the government's economic regulatory policies under the due process clause. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905). This

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[15] Members of this Court further specifically inquired as to why Congress could not enact "a statute parallel to the banking regulation" . . . to prevent telephone companies from "tak[ing] undue risks with their capital" by engaging in the provision of video programming or "any business except what they do now." *Id.* at *34.

Court clearly rejected such constitutional limits on Congress' and the states' regulatory authority decades ago.[16]

There would, moreover, seem to be no discernible limit to the position espoused by the cable industry, as innumerable governmental regulatory initiatives may, to varying degrees, involve speech or speech-related conduct. This Court's First Amendment jurisprudence has "not left Congress or the States powerless to address" serious economic or societal problems, and should not be interpreted as "imposing" rigid "judicial formulas" that "disable[] government from responding to serious problems." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 740-41 (1996) (plurality opinion).[17] Indeed, this Court has expressly recognized that regulatory policies promoting economic competition are congruent with—rather than contrary to—the First Amendment because they promote diverse sources of speech.[18]

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[16] *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144 (1938). *See also Chesapeake and Potomac* Oral Argument, 1995 U.S. Trans Lexis 107 at *30 (questioning the use of the First Amendment to "retreat from giving Congress quite a lot of discretion when it tries to deal with the structure of industries," and noting that "other people in history have used other amendments to sort of go into economic regulation in great depth").

[17] *See also CBS, Inc. v. DNC*, 412 U.S. 94, 102-3 (1973) ("'[W]e must construe [the First Amendment] as part of a Constitution which creates a government for the purpose of performing several very important tasks. The (First) Amendment should be interpreted so as not to cripple the regular work of the government. A part of this work is the *regulation of interstate and foreign commerce* . . . . '") (*quoting* 2 Z. Chafee, *Government and Mass Communications* 640-641 (1947)) (emphasis added).

[18] *See, e.g., Associated Press v. United States*, 326 U.S. 1, 20 (1945) (concluding that the "First Amendment, far from providing an argument against application" of the antitrust laws to the press, "provides powerful reasons to the contrary," as "[t]hat Amendment rests on the assumption

To ensure appropriate consideration to legislative policy judgments, the courts should accordingly afford Congress equal discretion to pass "an economic regulation" that "protect[s] consumers" from unreasonable "prices, or whatever," whether such regulation applies to a communications industry or to "cement companies," 1995 U.S. Trans Lexis 107 at *37-38, unless the regulation applicable to a communications industry "is directed at, or presents the danger of suppressing, particular ideas." *Leathers*, 499 U.S. at 453.[19] Certainly the appellate courts' almost reflexive application of heightened First Amendment scrutiny to any structural or economic regulation of the cable or other communications industry does not appear warranted.[20] Even counsel representing the telephone companies in the *Chesapeake and Potomac* cases, when questioned about the level of scrutiny to be applied, admitted that "[r]ules about the *structure* of an industry, about who may *own* what, are really quite different" [than the challenged ban on providing video programming]. 1995 U.S. Trans Lexis 107 at *31 (emphasis added). Because the record in this case contains no indication whatsoever that the horizontal and vertical cable ownership rules were "intended to suppress any ideas" or have "had that effect," *Regan*, 461 U.S. at 548, the court of appeals erred in concluding, under a heightened level of review, that the FCC had not met its burden of justifying these regulations under the First

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that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

[19] *See also Associated Press*, 326 U.S. at 7 (court observed that publishers "are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want . . . .The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary" from application of antitrust regulation).

[20] *See, e.g., FCC v. Beach*, 508 U.S. at 313 (in the area of "economic policy," it is not for the "courts to judge the wisdom, fairness, or logic of legislative choices").

Amendment.[21] This Court should therefore grant the petition for writ of certiorari in this proceeding.

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE LEVEL OF DEFERENCE THAT REVIEWING COURTS SHOULD ACCORD BOTH TO STATUTORY PROVISIONS AND TO AGENCY RULES PROMULGATED UNDER A SPECIFIC GRANT OF STATUTORY AUTHORITY.

As noted in CFA's petition (at 26), the cable ownership regulations were not adopted under the Commission's generic statutory powers, but were "issued under a specific grant of authority to . . . prescribe a method of executing a statutory provision." *Rowan Cos., Inc. v. United States*, 452 U.S. 247, 253 (1981).[22] The court of appeals should accordingly have shown greater deference to the FCC's interpretation of Section 533(f) than to any regulation adopted pursuant to the FCC's general authority under the 1934 Communications Act to regulate in the "public interest, convenience, and necessity."[23] Indeed, the horizontal and vertical ownership

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[21] *Compare R.A.V.*, 505 U.S. at 394 (in holding unconstitutional a city hate speech ordinance, the Court expressly found that the city's intent in adopting the ordinance was to "handicap the expression of particular ideas").

[22] Specifically, Congress directed the FCC "to prescribe rules and regulations establishing *reasonable* limits" on the reach of commonly-owned cable systems and on cable operators' integrated ownership interests in programmers. 47 U.S.C. § 533(f)(1)(A) & (B) (emphasis added). The word "reasonable" is "among the broadest in the congressional lexicon of delegation." *Williams Natural Gas Co. v. FERC*, 943 F.2d 1320, 1331 (D.C. Cir. 1991).

[23] *See Rowan*, 452 U.S. at 253; *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (reviewing court owes less deference to a regulation promulgated under an agency's general authority to "prescribe all needful rules" than to a regulation "issued under a specific grant of

limits should have—and clearly did not—receive "more than mere deference or weight."[24] In Section 533(f), Congress "expressly *delegated*" to the Commission "the power to prescribe" rules and regulations establishing the cable ownership limits at issue here. *Batterton*, 432 U.S. at 425 (emphasis in original). "In a situation of this kind, Congress entrusts" to the Commission, "rather than to the courts, the primary responsibility for interpreting the statutory term[s]," and a "reviewing court is not free to set aside those regulations," which have "legislative effect," even though "it would have interpreted the statute in a different manner." *Id.*

But instead of showing "controlling" weight to the Commission's legislative rules implementing Section 533(f),[25] the court of appeals in this proceeding showed so little deference that it effectively undermined Congress' clear intent in passing this section and expressly delegating authority for its implementation to the Commission. Such decisions frustrate the ability of Congress to rely on administrative agencies, and pressure Congress to, in effect, write regulations as statutes so as to obtain proper deference to its wishes from the judiciary. The cumulative result of decisions such as the appellate court's here would be to prevent Congress from relying on the experience and expertise of agencies in formulating regulatory policies, and, ultimately, to cause a decline in the quality of regulatory decisions.[26]

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authority to define a statutory term or prescribe a method of executing a statutory provision").

[24] *Batterton, Secretary, Department of Human Resources of Maryland v. Francis*, 432 U.S. 416, 426 (1977) (upholding agency's prescription of standards under a provision of the Social Security Act).

[25] *United States v. O'Hagan*, 521 U.S. 642, 673 (1997) (Court owed "controlling weight" to legislative rules prescribed by agency).

[26] For these reasons, numerous cases emphasize the importance of courts deferring to the expertise and predictive judgments of agencies. *See, e.g., Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 697 (1991)

But even beyond the deference owed to agencies when adopting legislative rules, this Court has stressed the significant deference owed by the judiciary to the judgments of Congress. *See, e.g., Turner II*, 520 U.S. at 195-96. Reviewing courts should therefore not be able to circumvent the deference they owe to Congress by first upholding a challenged statute under deferential review, but then showing virtually no deference to the regulations promulgated by the agency expressly directed to implement the same statute.[27]

An instructive comparison can be made between the case initially upholding the constitutionality of the statutory provisions directing the Commission to establish the horizontal and vertical ownership limits, and the later decision striking down the FCC's regulations implementing those provisions. In the first decision, the court easily upheld Section 533(f), clearly giving deference to "Congress's predictive judgments" and dismissing assertions that Congress acted without sufficient evidence and findings. *Time Warner Entertainment Co., L.P. v. United States*, 211 F.3d 1313, 1319-20, 1322 (D.C. Cir. 2000).[28] In complete contrast, when examining the

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(deference to agency was "appropriate" because the "regulatory program" at issue was "complex and highly technical," requiring "significant expertise" and the "exercise of judgment grounded in policy concerns"); *NCCB*, 436 U.S. at 813-14 (this Court reversed lower court for failing to show proper deference to determinations of FCC that "were primarily of a judgmental or predictive nature"). Even in evaluating "First Amendment claims," this Court has emphasized that "we must afford great weight to the decisions of Congress and the experience of the Commission." *CBS*, 412 U.S. at 102.

[27] *See Williams Natural Gas*, 943 F.2d at 1332 (court rejected challenges to an agency decision concerning price ceilings for natural gas, saying "[i]t is not our office to argue energy policy with the legislature, *nor a fortiori with the agency it has charged with implementing that policy*") (emphasis added).

[28] For example, although the court could not say, on the evidence presented, that the horizontal "ownership cap will surely increase the

FCC's rules, the court engaged in "an intermediate in theory, but strict in fact" review (CFA's petition at 23) that showed little or no deference to the Commission.[29]

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diversity of programming," it was "enough" that "Congress reasonably concluded" that greater concentration in the cable industry "threatened the diversity of information available to the public." *Time Warner*, 211 F.3d at 1320. Similarly, complaints that the vertical ownership limit addressed "only a speculative harm" were rejected with a brief reference to congressional findings on the issue, and the comment that Congress' concern was grounded in "a bit of economic common sense." *Id.* at 1322.

[29] For instance, from the outset, the court stressed that its review of the regulations (as opposed to the earlier review of the statutory provisions) presented an "independent set of questions," and that, just because there was "authority to impose some [ownership] limit," the Commission did not have "authority to impose any limit imaginable." *Time Warner*, 240 F.3d at 1129-30. The court consistently dismissed both Congress' and the Commission's findings as conjectural and/or insufficient to support the regulations, although Congress' findings had easily been found sufficient to justify the statutory provisions. *Id.* at 1130-32; 1137. (Particularly puzzling in this regard is the court's conclusion that both Congress and the FCC failed to provide sufficient support to justify the horizontal ownership limit as protective of potential programmers from joint cable operator action. After all, the statute expressly directed the FCC to "ensure" that no "group of cable operators" could "unfairly impede" because of "joint actions" the flow of video programming to consumers. 47 U.S.C. § 533(f)(2)(A).) With regard to questions of economic and competition policy, the court second-guessed the FCC's judgment on a number of points (*see* 240 F.3d at 1132-35) and, in one instance, dismissed the FCC as offering only an "economic commonplace." *Id.* at 1132. *Compare Time Warner*, 211 F.3d at 1322 (upholding vertical ownership statutory restriction because Congress' concern was grounded in "economic common sense"). Most seriously, the court clearly substituted its own judgment for the judgment of the FCC, especially with regard to the appropriate level of the horizontal ownership limit. *See Time Warner*, 240 F.3d at 1132 (indicating that a horizontal limit of 60% was justified, rather than the FCC's 30% limit) and 1136 (asserting that Section 533(f) greatly confined the FCC's authority to regulate in its long-standing interest of diversity, even though the statute did not say so and, in fact, directed the FCC to take into account specifically enumerated diversity-related concerns, as well as "other public interest objectives").

This stark difference between the level of deference afforded the cable ownership statutory provisions and the cable ownership rules simply cannot be justified. At the very least, the review accorded legislative rules adopted by agencies pursuant to express statutory directives should not be so strict as to thwart congressional intent and undermine the significant deference that reviewing courts owe to Congress. *See Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 865-66 (1984) (stressing that Congress and executive branch agencies, which are politically accountable, should make "policy choices," and that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do"). Given the court of appeals' ultimate failure to give proper deference to Congress' judgment concerning the ownership structure of the cable industry, this Court should grant CFA's petition for certiorari.

CONCLUSION

For the foregoing reasons, the National Association of Broadcasters urges the Court to grant the petition for certiorari in this case to address issues significantly affecting Congress' economic regulatory powers and the ability of administrative agencies to implement explicit congressional directives.

Respectfully submitted,

HENRY L. BAUMAN
JACK N. GOODMAN *
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

* Counsel of Record

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